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***ROE V. WADE* AND ITS PROGENY: THE IMPACT OF STATE LEGISLATIVE AND  
JUDICIAL ACTIONS ON ABORTION RATES IN FIVE STATES**

A Thesis

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agriculture and Mechanical College  
in partial fulfillment of the  
requirements for the degree of  
Master of Arts

in

The Department of Political Science

By  
Maria Klimash  
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M.A., Louisiana State University, 2008  
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## **ABSTRACT**

By looking at the courts and legislatures as agents of social change, this study seeks to assess the impact of judicial decisions in a particularly contentious area, the right to bodily privacy. Specifically, I seek to understand the competing effects of state supreme court decisions and state statutes on the consumers of their public policy choices. Past studies have found conflicting results concerning the impact of court decisions. Literature assessing the effect of legislation finds that statutes, which are specific in nature, engender significant effects. For this study I focus specifically on court decisions and legislation that are concerned with access to reproductive services, and their impact on abortion rates within five states: Alabama, Colorado, Florida, Illinois, and Massachusetts from 1973 through 2000. My preliminary analysis suggests that both legislative and judicial actions have significant effects, though not necessarily in the intended direction.

## CHAPTER 1 INTRODUCTION

The effect of appellate court decisions has garnered significant attention by judicial scholars. While some scholars have found significant effects of particular decisions of the Supreme Court, more frequently, scholars have found that the Supreme Court's ability to affect broad changes in public policy is limited. Most notably among the latter category of scholars are Dahl (1957) and Rosenberg (1991).

In his seminal article on the Supreme Court as a national policy maker, Dahl (1957) argued that the Court in general would reflect the national sentiment. Its decisions will not stray far from the national zeitgeist because its membership will on average reflect the preferences of the popularly elected president. Thus while the court may be out of step for short periods of time, the appointing power of the president will shape the court so that it reflects public opinion over time and thus casts legitimacy on public policy. Dahl concludes his work by stating that "by itself the Court is almost powerless to affect the course" of fundamental national policy (1957:293).

Rosenberg (1991) similarly argues that the Supreme Court is limited in its ability to significantly change social policy. This "constrained" view asserts that the Court's capacity to facilitate change is inhibited by its dependence upon popularly elected presidents for its membership and its dependence upon others to implement its decisions.

Rosenberg argues that courts are essentially incapable of producing significant social reform, but courts can supplement social reforms that are initiated by other branches of government. In his examination of the Court's decision in *Roe v. Wade* (1973), he finds that the number of abortions performed increased after the decision in *Roe*, but argues that this increase was part of a trend that began in 1970, prior to the Court's decision. Rosenberg finds that other

branches of government significantly ameliorate the effect of appellate court decisions. While the Court maintains structural independence from the other branches of government, its dependence upon other actors for the implementation of its decisions significantly limits its ability to produce large-scale changes in public policy.

Many scholars oppose the conclusions that the Court is constrained in the amount of change it produces. Canon and Johnson (1999) consider that Rosenberg miscalculates the Court's impact on salient issues such as abortion and desegregation in schools. They also note the absence of important issues that exemplify how the Court produces social change, such as accessibility of obscene materials and religion in schools. However, both Rosenberg (1991) and Cannon and Johnson (1998) agree that implementation of court decisions rely on other political and legal actors.

## CHAPTER 2 REVIEW OF THE LITERATURE

### Contemporary Related Studies

A number of studies have been conducted examining the impact the Supreme Court's decision in *Miranda v. Arizona* (1966). Medalie, Zeitz, and Alexander (1968) examine the implementation of *Miranda* in Washington D.C. by analyzing the defendants' behavior after their arrest, as well as the police practices post-*Miranda*. They find that police do not consistently follow *Miranda*'s dictates that even when provided *Miranda*'s warnings, defendants continue to provide statements. Seeburger and Wettick (1967) study the impact of *Miranda* in Pittsburgh by analyzing the confession rate pre-*Miranda* and post-*Miranda*. Their results are in contrast with Medalie et al; they find that there is a significant decline in confessions after the Court's decision in *Miranda*. The authors attribute this to the impact of the Court's decision in *Miranda*.

Gruhl and Welch (1999) examine the impact of the Bakke (1978) decision approving the consideration of race as one of a number of factors in admissions process. In this study, they specifically focus on the enrollment of African Americans and Hispanics in medical and law school. The authors find mixed results; the Court's decision had a negative impact on the African American and Hispanics applications, but had a positive impact on the rate of acceptance to medical and law school.

Most of the impact literature has focused on the implementation of Supreme Court decisions; Baird (2004) examines how the Court has an impact by the cases that it chooses to hear. Baird argues that the Court has a signaling effect on the litigant community to support litigation in particular policy areas. Interestingly, Baird notes that the Court needs extra-judicial actors to make comprehensive policy.

Early studies of impact focused on the effect of Supreme Court decisions on the subsequent behavior of those required implementing the decisions (Peltason 1955; Vines, 1964; Birkby, 1966; Lefstein, Stapleton and Teitelbaum 1969; Wasby 1970; Canon 1973, 1974; Romans 1974; Wilkes 1974; Gruhl 1980; Comb 1982). These studies found that public opinion and the behavior of elite perceptions were particularly influential in the implementation of Supreme Court opinions and thus their eventual impact.

In studying the hierarchical nature of the implementation of Supreme Court decisions, scholars have argued that lower federal and state courts have sufficient discretion to significantly alter, limit or expand the impact of the apex court's directives (Murphy 1959; Baum 1976, 1980). Johnson and Canon's (1998) seminal work on impact suggests that impact is significantly affected by implementation and the actors associated with transforming the verbiage of court policy to actual action. Glick (1994) examines not only the impact of Supreme Court decisions on lower courts as well as the impact on lower legislative bodies. His work suggests that lower institutions whose prior policies were broader than the Supreme Court's decision will ignore the Court's decision and adhere to the previous policy. As well the lower institutions whose previous policy lags a Supreme Court decision will evolve the policy to meet but not surpass the latest Supreme Court decision.

Most of the literature examining the impact of the court system in the United States focuses primarily upon the impact of the U.S. Supreme Court. Johnson and Cannon (1999) study the impact of state supreme court decisions and discuss how in several states these decisions do have an impact. They focus primarily on the telling impact of 15 state supreme court decisions on financing policies.



I seek to expand on the impact literature by exploring a particularly salient issue, access to abortion services. In particular, I seek to assess the competing effects of state supreme court decisions and state statutory policies on abortion rates. If the constrained view is correct, I would expect state court decisions to have less impact than legislative actions. Since state courts are in large part dependent upon executive and legislative branches to implement their decisions, I would expect that legislative action would gain prominence in affecting abortion rates. That is, legislative action aimed at decreasing the number of abortions should have stronger effects than state supreme court decisions that do likewise.

### ***Roe v. Wade* and Access to Reproductive Services**

Previous research on the impact of *Roe v. Wade* has focused on a number of areas potentially affected by the Court's far-reaching protection of the right to bodily privacy. Halva-Neubauer's (1990) study of *Roe*'s more conservative progeny, *Webster v. Reproductive Health Services* (1989), finds that state courts were important in determining abortion policy.

Legislatures seem reluctant to tackle the abortion question even when provided the imprimatur of a more conservative Supreme Court, restricting the ability of states to "bring about fundamental change quickly" (1990, 27). Nossiff (1994) also finds that states are slow to respond to the Supreme Court's decisions.

Hansen's evaluation of access to abortion finds that Medicaid funding had little effect on abortion rates once one controls for state population. Her analysis further demonstrates that over time, the greatest increases in access to abortion emerged in the most restrictive states. However, variation in abortion rates were related to variations in funding, hospital services, population, religion and political ideologies (Hansen 1980). Wetstein and Albritton (1995) find significant relationships between abortion use and abortion policy adopted by the states. Their research

focuses on the complex relationship between public opinion and the adoption of public policy. They find abortion policy had “profound effects” on access to abortion providers (1995, 91).

Kemp, Carp and Brady’s early work on the effect of *Roe* suggests that abortion providers adhered closely to state statutes, which restricted abortion access. However, post-*Roe* analysis finds that access increased and hospitals responded to the Court’s decision by adopting more “liberalized abortion policies” (1978, 31). The degree of impact was a function of resource variables (the need for increased income) and decisional variables (ideology of decision-makers). Bond and Johnson’s seminal study similarly explored hospitals’ provision of abortion services and finds that organizational norms have greater impact on the implementation of Supreme Court decisions than do community preferences, or incentives and disincentives (1982). Their work also finds significant relationships between community preferences and hospital abortion policies, particularly for highly salient issues such as abortion rights (Johnson and Bond 1982).

Haas-Wilson’s evaluation of the Court’s restrictions concerning minors’ access to abortion finds that parental involvement statutes significantly decreased “minors’ demand for abortions” as did state restrictions on Medicaid funding (1996 140). Her research demonstrates that state legislative policies can have significant impact on public behavior. By restricting both funding and facilitation of abortion services, these states decreased the access of minors to abortion services.

While previous research is instructive, its conclusions are limited. The research suggests that the attitudes of relevant policy makers determine whether the states respond to Supreme Court decisions in a restrictive or expansive manner. I assert that the impact of appellate court decisions is ameliorated by a number of factors. First, I argue that state supreme courts serve as mediators between the Supreme Court’s policies and legislative and executive bodies that seek to

implement them. As such, state supreme courts could have significant impact on public policy. However, I argue that state legislatures in particular are well situated to respond to both the Supreme Court and the intermediate state supreme courts if sufficiently motivated. State supreme courts have many opportunities where they can initiate policy. First, the number of cases that state supreme courts hear is large. In the early 1980's the fifty state supreme courts decided over 53,000 cases per year, and that number is only rising (U.S. Department of Justice 1983). Second, state supreme courts are most often the last court to hear a case. In a sample of 6,000 state supreme court decisions, only two percent were appealed to the United States Supreme Court, and of those only a few were granted review (Kagan, Cartwright, Friedman, and Wheeler 1977).

Previous research finds that public opinion is significantly related to the policies adopted by state legislatures, and I will not reiterate that research here. I presume that states adopt policies that reflect the general sentiment of their constituents, particularly in policies as salient as access to abortion. However, I seek to assess the impact of state supreme courts whose decisions can either facilitate or restrict the preferences of state policy makers.

### **Competing Institutions**

The Constitution separates the power of government into three different branches of government the judicial, legislative, and executive. However, each of these branches of government is checked by one another. The President appoints a justice with the consent and advice of the Senate, Congress controls the Court's appellate jurisdiction and its size, and the Supreme Court has the power to declare state and federal legislature as well as executive actions unconstitutional. The Court was also granted institutional protections, such as life tenure, which allows the Court to remain independent. Segal (1997) examines how the Court is independent

and able to make decisions that are not bound by the political constraints of Congress and the President.

A core responsibility of the Court is the interpretation of the statutes that have been passed by Congress. The point of contention between the court and the legislature, at both the federal and state levels is the courts' power of judicial review. Judicial review allows for courts to declare legislation unconstitutional; this power was granted by the U.S. Supreme Court decision in *Marbury v. Madison* (1803). Since 1960 the Supreme Court has been overturning statutes passed by the President and Congress at an average of two per year. This rate is more than double than rate in the beginning of the twentieth century and four times the rate since 1790 (Baum 1989). Dahl (1957) is best known for examining the Supreme Court and legislative relations. In his study he examines 167 years following the adoption of the Constitution. He finds that the Court declared only eighty-six different provisions of federal law unconstitutional, and only thirty-eight were struck down within four years of passage. Smith (2005) examines the Clean Air Act to exemplify how the Court is an agent of Congress. In this piece of legislation Congress controls who can challenge an agency in court, which court has jurisdiction and other parameters of judicial action. As well Smith finds that when the executive and the legislature are ideologically similar, it will be less likely to turn to the courts.

Congress has the ability to retaliate if they are unhappy with the Court's interpretation. However, popular pressures and divisions within Congress have restrained Congress from intervening with many of the Court's interpretations. When Congress has intervened in the Court's decision it has several different actions that it may take. The most aggressive action that Congress can take against the Court is to initiate the process of creating a constitutional amendment that would limit the Court's power or override a Court decision. A less aggressive

action Congress can take against the Court is to simply rewrite a statute that the Court has overturned. One study evaluating legislation passed between 1945 and 1957 finds that Congress rewrote statutes that reversed twenty-six Supreme Court decisions concerning federal taxation and twenty-one decisions on other subjects (Harvard Law Review 1958, Stumpf 1965). However, Henschen (1983) reviews 222 Supreme Court cases involving labor and antitrust laws between 1950 and 1972. Only 27 of these decisions were subject to congressional action, and of those only 9 statutes were passed that overturned the Court's decision. In recent studies (Eskridge 1991 and Solimine and Walker 1992) authors have similar figures as reported above.

In a more specific study, Beaney and Beiser (1964) examine the impact of the Court's decisions declaring the reading of Bible passages or saying of prayers as a religious exercise in public schools as unconstitutional. The authors focus on the Court's decision in the cases *Engel v. Vitale* (1962) and *School District v. Schempp* (1963), and the response from Congress. There was a violent response from Congress in regards to *Engel*. The day after the decision in *Engel* was made Frank Becker, a New York Republican member of Congress, introduced his amendments to the Constitution that would allow public schools to conduct religious exercises. Merely a month after the *Engel* decision Senator Eastland's Judiciary Committee conducted a hearing, which allowed a discussion amongst the angered congressional members. The Senators who testified at this hearing had hopes of passing a joint resolution that would propose amendment to the Constitution to allow prayer and Bible readings in school. The testimonies of this hearing also show that those Senators who testified were aware that the Court would soon be deciding *Schempp* which would examine the constitutionality of the recitation of the Lord's Prayer and Bible reading in public school.

These findings are rather interesting because they demonstrate that the Senators were not only interested in what the Court had done previously, but are also affected by what they may do in the future. Even after all the discussion in the Congress following *Engel*, no legislation was passed. After the 1963 decision there was a greater surge of activity from the Congress than there had been following *Engel*; following *Schempp* there were 140 amendments proposed by Congress to reverse the Court's decision, as opposed to the 75 amendments Congress proposed to reverse the Court's decision in *Engel*.

Several pieces of literature examine factors other than institutional preferences that correlate with Congressional overrides of Supreme Court decisions (Hausegger and Baum 1998; Henschen 1983; Hettinger and Zorn 2005; Ignagni and Meernik 1994 Ignagni, Meernik, King 1998, and Mooney and Lee 1995.) A uniting factor in all of these studies is the importance of case salience, meaning the degree to which a specific case warrants congressional attention. In a court case that addresses a more salient issue the literature would suggest that legislatures are more likely to respond to a court decision that they did not approve of. In addition, when an issue is more salient more deference is given to the legislature, and the court becomes less powerful (Vanberg 2001).

. Canon and Johnson (1999) assert that the impact of the Supreme Court decisions is based upon the implementation of their decisions. The process of implementing Supreme Court decisions is a political process, which most often means that the implementation of the Court's decision is dependent upon political actors who are constrained by political pressures. The Court is not only limited in its ability to implement the decisions it makes, but is also restrained in its oversight of the implementation. The Court must wait until the manner of implementation is brought to court (Cannon and Johnson 1999).

The past literature focuses the majority of the research upon the United States Supreme Court. Hoekstra (2005) focuses primarily at the state supreme courts decisions. She concentrates on court decisions and legislation concerning wages and hours, and by doing so suggests that state supreme court decisions are influenced not by only U.S. Supreme Court decisions but are influenced by state actors as well. Hoekstra suggests that state supreme court decisions may not be merely a product of their own policy preferences, but rather a product of their as well as those of federal and state actors. In this study, I further examine the influences of the federal and state actors on state supreme court decisions. As well this study expands upon the knowledge of the relationship between the legislative and judicial branches of the government at the state level.

### **Statutory Responses to Reproductive Services**

The 1960s saw a significant increase in efforts to protect reproductive services at both the state and federal levels. After *Roe* various states began to confirm their laws while others began enacting restrictive laws. This trend began because abortion was a state matter and the individual state's action could affect the availability to legal abortion. Following *Roe*, restrictive and anti abortion campaigns were initiated and sought the most restrictive laws on abortion. Many of these anti-abortion groups focused their attention at the state and local level in attempts to limit the availability of abortions (Craig and O'Brien 1993). At the end of 1973, 260 abortion-related bills were introduced to the different state legislatures; 39 were enacted. In 1974, 189 abortion-related bills were introduced to the state legislatures, and 19 were enacted (Rosenberg 1991). Pro-choice activists began to develop bipartisan political support inside the state legislatures and achieved some initial successes in liberalizing access to abortion (Doan 2007, 59).

Previous to *Roe*, Louisiana, Pennsylvania, and New Hampshire prohibited all abortions. Thirteen different states<sup>1</sup> allowed abortions to preserve the life of the mother or to protect the woman's physical or mental health. Mississippi permitted abortions to preserve the life of the mother, protect the mother's physical or mental health and also in cases of rape. However, twenty-nine states<sup>2</sup> only allowed for abortions to preserve the woman's life (Craig and O'Brien 1993).

Among the first victories claimed by abortion rights' activists was the 1970 legalization of abortion in Hawaii for state residents. New York further expanded access by not requiring residency to attain an abortion. California emulated New York's relaxation on residency in their legalization of abortion; soon to follow them were Alaska and Washington (Risen and Thomas 1998, 15-16). Abortion rights' advocates had limited success after these reforms to make reproductive services more available. While 14 different states made abortions legal, under certain conditions (Risen and Thomas 1998), 34 states retained restrictive abortion policies (Epstein and Kobylka 1992). Following the Supreme Court's decision in *Roe v. Wade*, which many see as the galvanizing event for oppositionists, numbers of states passed legislation aimed at restricting access to abortion given their inability to ban it outright. Table 1 notes the different statutes aimed at restricting reproductive services that were passed among the various states. The statutes may differ slightly across states, but are fundamentally the same in their substance and purpose.

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<sup>1</sup> Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

<sup>2</sup> Alabama, Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming



**Table 1: Description of Restrictive Statutes**

<i>Mandatory Counseling</i>	The goal of this law is that all patients understand the procedure and the risks associated with it. There are two difficulties with this restriction. First, a mandatory counseling restriction is usually a repetitive action, because doctors are required by law to discuss procedures and their risks. Second, the script that is read to those is biased in nature.
<i>Mandatory Delays</i>	This restriction requires that women wait a certain time period after they have been read or given materials containing information on the abortion procedure. Legislators assert that this law is intended to make sure that women have thought about the procedure and its following consequences before having the procedure done.
<i>Parental Notification</i>	These types of restrictions garner the greatest public support. The argument is that parental input is critical for minors.
<i>Hospital Only and Physician Only</i>	These restrictions limit where and who can perform abortions. Many regulations concerning abortions are associated with safety issues; however, these restrictions significantly increase the cost of services.
<i>Gag Rules</i>	This is a restriction that prohibits workers in state-run healthcare facilities from mentioning abortion as an option with patients. This restriction largely limits the access of abortions to low income women.
<i>TRAP Laws</i>	Targeted Regulations of Abortion Providers are restrictions that target medical doctors and facilities that perform abortions, and inflict more taxing requirements that are stricter than for other medical procedures.
<i>Abortion Bans</i>	These are bans that were usually enacted before the <i>Roe</i> decision and never were dismissed. All of these bans are unconstitutional and unenforceable.
<i>Husband Notification or Consent</i>	This statute maintains that the husband be either notified or give his consent for the abortion to occur. The Supreme Court has banned spousal consent.
<i>Refusal Clause</i>	This constraint on abortion maintains that a federally funded healthcare facility may deny women abortion services.

Table 2 denotes statutes passed by states that protect the right to reproductive services. These include the right to have an abortion and the right to contraceptives. These statutes differ between individual states, but are considered similar in their nature and objectives. Table 3 identifies which states have passed legislation that is restrictive of receiving reproductive services. While there is significant variation among states in the types of restrictions adopted,

**Table 2. Description of Protective statutes**

<i>State Constitutional Protection</i>	This essentially protects women's fundamental right to an abortion to a greater degree than the federal Constitution.
<i>Public Funds</i>	This law declares that low-income women will have financial assistance for an abortion in situations when the women's health is at risk and situations of rape or incest.
<i>Emergency Contraceptive</i>	This law states that sexual assault victims must receive information related to emergency contraception in hospital emergency rooms. Some of these laws have an amendment that allows doctors to refuse to do this based on their religious or moral beliefs.
<i>Protection from Clinic Violence</i>	This regulation is enacted to protect those going to a medical facility that performs abortions from protestors. Protestors are regulated as to how close they may come to the facility when trying to persuade others in anyway about the abortion procedure.
<i>Guaranteed Access</i>	This protection is in place so that women may get their contraceptives from a pharmacy without interference.
<i>Insurance Coverage</i>	This law enforces health insurance companies that cover prescription drugs to provide equal coverage for contraceptives.

what is clear from Table 3 is that every state passed some limitation on abortion access. What is unclear from previous studies is the effect that these statutes had on abortion rates, and particularly when these statutes are balanced against restrictive and permissive decisions of state supreme courts. Table 4 provides types of protective statutes passed by particular states and Table 4 lists which states have adopted which types of protective statutes. In contrast to Table 3, there are a number of states that have passed no statutory protections of reproductive services for women. Table 4 provides types of protective statutes passed by particular states and Table 4 lists which states have adopted which types of protective statutes. In contrast to Table 3, there are a number of states that have passed no statutory protections of reproductive services for women.

**Table 3: Reproductive Service Restrictions by State**

State	Abortion Ban	Husband Consent Or Notification	Mandatory Counseling	Waiting Period	Minor Consent or Notification	TRAP Laws	Hospitals-Only	Physicians-Only	Gag Rules
AL	x-1		X	X	x-2	X		X	X
AK	x-1		X		x-2,1	X	X	X	
AZ	x-1				x-2	X		X	X
AR	x-1		X	X	x-2	X	X	X	
CA					x-2,1			X	
CO	x-1	x-1			x-3			X	
CT						X	X	X	
DE	x-1		x-1	X	x-3			X	
DC									
FL	x-1		x-1		w-3,1	X		X	
GA					x-3	X	X	X	
HI						X	X	X	
ID	x-1		X	X	x-2,1	X	X	X	
IL	x-1	x-1			x-3,1	X		X	X
IN	x-1		X	X	x-2	X	X	X	X
IA	x-1				x-3			X	
KS			X	X	x-3				X
KY	x-1	x-1	x-4	X	x-3	X		X	X
LA	x-1	x-1	X	X	x-2	X		X	X
ME			X		x-2			X	
MD					x-3			X	
MA	x-1		X	x-1	x-2	X	X	X	
MI	x-1		X	X	x-2	X		X	X
MN			X	X	x-3	X	X	X	X
MS	x-1		X	X	x-2	X	X	X	X
MO	x-1		x-1	x-1	x-2	X	X	X	X
MT			x-1	X-1	X-3,1			X	
NE	x-1		X	X	x-3			X	X
NV					x-3,1	X	X	X	
NH					x-3,1				
NY	x-1				x-3,1	X	X	X	
NM	x-1				x-2,1			X	
NY						X	X	X	
NC					x-2	X	X	X	
ND	x-1	x-1	X	X	x-2	X	X	X	x-1
OH	x-1		X	X	x-3	X	X	X	X
OK	x-1				x-2,1		X	X	
OR									
PA		x-1	X	X	x-2	X	X	X	X
RI	x-1	x-1	X		x-2	X	X	X	
SC	x-1	x-1	X	X	x-2	X	X	X	X
SD	x-1		X	X	x-3	X	X	X	
TN	x-1		x-1	x-1	x-2	X	X	X	
TX			X	X	x-3	X		X	
UT	x-1	x-1	X	X	x-3	X	X	X	
VT	x-1								

(Table 3 Continued)

VA	x-1		X	X	x-2	X	X	X	X
WA								X	
WV	x-1		X	X	x-3				
WI	x-1		X	X	x-2	X	X	X	X
WY					x-2			X	

Note:

1. State's law in this area has been found unconstitutional and unenforceable
2. State requires parental *consent* of either one or two parents
3. State requires parental *notice* of either one or two parents
4. Kentucky's counseling law is unconstitutional only in the requirement that the state-mandated information and materials be delivered in person

*Source:* Who Decides? The Status of Women's Reproductive Rights in the United States, 15<sup>th</sup> ed. (Washington, D.C.: NARAL Pro-Choice America, 2006)

**Table 4. Protection of Reproductive Services by State**

State	Emergency Contraceptive	State-Funded Insurance Coverage for Contraception	Public Funds for Abortion	Protection from Clinic Violence	State Constitutional Protection	State Statutory Protection
Alabama						
Alaska	X		X		X	
Arizona		X	X		X	
Arkansas						
California	X	X	X	X	X	X
Colorado				X		
Connecticut		X	X	X	X	X
Delaware		X				
District of Columbia				X		
Florida					X	
Georgia		X				
Hawaii	X	X	X			
Idaho						
Illinois	X	X	X		X	
Indiana					X	
Iowa		X		X		
Kansas				X		
Kentucky						
Louisiana						
Maine	X	X		X		X
Maryland		X	X	X		X
Massachusetts		X	X	X	X	
Michigan				X		
Minnesota			X	X	X	
Mississippi						
Missouri		X				
Montana			X		X	
Nebraska						
Nevada		X		X		X
New Hampshire		X				
New Jersey			X		X	
New Mexico	X	X	X		X	
New York	X	X	X	X		
North Carolina		X		X		
North Dakota						
Ohio						
Oklahoma						
Oregon	X		X	X	X	
Pennsylvania		X				
Rhode Island		X				
South Carolina	X					

(Table 4 continued)

South Dakota						
Tennessee					X	
Texas						
Utah						
Vermont		X	X		X	X
Virginia						
Washington	X	X	X	X		X
West Virginia			X		X	
Wisconsin		X		X		
Wyoming						

## CHAPTER 3 MATERIALS AND METHODS

### Data

I seek to explore the impact of legislative and judicial policies. Specifically, I seek to assess the effect of statutory policy and state supreme court decisions on abortion rates. While previous research suggests that legislative policy narrowly tailored can have significant effects (Goodin 1977; LeLoup 1978; Frantzich 1979; Lewis-Beck and Alford 1980; Ethridge 1981; Oppenheimer 1983; Abney and Lauth 1987 among others), research on judicial impact has been less clear. Because I am embarking on an initial study of competing effects, I have no clear theoretical expectations. However, given that legislatures have the capacity to respond to appellate court challenges to statutory language, I anticipate that over time, legislatures will have more significant effects on public policy than will the judiciary,

To assess the competing effects of legislative and judicial action, I have selected five states for analysis: Alabama, Colorado, Florida, Illinois, and Massachusetts. The selection of these states was guided primarily by the desire to ensure that one state was selected from each region. Geographical region has often been addressed as a contextual variable that affects judicial decision-making. Carp and Rowland (1983) find that judicial decisions are more conservative in the South and West than their fellow courts in the North and Midwest also ensured that these states differ in the laws, which they have passed. Table 5 lists the different restrictive laws that each of the state legislatures included in my study has passed.

The dependent variable for this study is the abortion rate computed for each state from 1973 to 2000. Taking the number of legal abortions performed as reported by the Center for Disease Control in the state and dividing it by the total number of fertile women in the state for Disease Control in the state and dividing it by the total number of fertile women in the state for that year

**Table 5. State Legislative Actions among States Included in the Analysis**

<b>State</b>	<b>Restrictive Laws</b>
Alabama	Abortion ban, Biased counseling & mandatory delay, Counseling ban/Gag rule, Physician-only restriction, Public funds restriction, Restricts minor's access, TRAP, Post-viability restriction, Hospital requirement.
Colorado	Abortion ban, Husband consent, Insurance prohibition, Physician-only restriction, Refusal, Public funds restriction, Restricts minor's access.
Florida	Abortion ban, Biased counseling, Physician-only restriction, Refusal, Public funds restriction, Restricts minor's access, TRAP, Post-viability restriction, Fetal homicide law.
Illinois	Abortion ban, Counseling/Gag rule, Husband consent, Insurance prohibition, Anti-choice legislative declaration, Physician-only restriction, Refusal, Restricts minor's access, TRAP, Post-viability restriction, Fetal homicide law.
Massachusetts	Abortion ban, Biased counseling & mandatory delay, Insurance prohibition, Physician-only restriction, Refusal, Restricts minor's access, TRAP, Post-viability restriction, Hospital requirement, Fetal homicide law.

formulate the abortion rate. The number of fertile women is comprised of the population of women between the ages of 15 and 44 as reported by the U. S. Census Bureau.

I include two primary measures of public policy – legislative and judicial. To measure states' abortion policies I use Doan's index of abortion statutes (Doan 2007). Two variables were combined to create the index. First, a variable for all legislative action in any year that was restrictive in nature was created. All legislation in any year that restricted the right to bodily privacy was given a score of 1 with each year's score added to the previous year. A similar variable was created for legislation that protected the right to bodily privacy. Each state was then assigned an index calculated annually by subtracting the protective statutes from those that restricted bodily privacy. Positive scores indicate more conservative policies while negative scores indicate more protective policies. The state legislative index ranged from a minimum of 0 to a maximum of 8 with a mean of 3.3.



Similarly, the state supreme court index is calculated for state court decisions. State supreme court decisions were gathered from LexisNexis and were coded as either restrictive or protective. These decisions were cumulatively calculated over time for each state in the manner noted above. Thus, state supreme courts with negative annual scores were more protective of bodily privacy in their decisions while those with positive scores were more restrictive. The state supreme court index had a minimum of -7 and a maximum of 4 with a mean score of -.12. Clearly state legislatures are much more conservative in their behavior than are the state supreme courts.

I also include control variables for income and ideology, as well as a counter variable to assess temporal effects. I expect that states with greater individual income will have lower abortion rates. I use the non-inflated per capita income for each state; data are derived from the U.S. Census Bureau. I also expect lower abortion rates in states with more conservative political ideologies. I use state ideology data from the state citizen and government ideology dataset (Berry, Ringquist, Fording and Hanson 1998). I use the expanded Berry et al. data to cover the years 1973 to 2000. I assess temporal effects by placing a continuous counter variable for each state over time. I also include dummy variables for each state in the analysis. For reference purposes, Colorado is the excluded state.

I evaluate the affects of United States Supreme Court decisions on the state supreme court decisions by examining two significant Court cases; *Webster v. Reproductive Services* (492 U.S. 490 [1989]) and *Planned Parenthood v. Casey* (505 U.S. 833 [1992]). The Supreme Court in *Webster* the Supreme Court permitted a number of restrictions that were passed by the Missouri legislature including viability testing at 20-weeks (eliminating the trimester approach of *Roe*) and prohibition of public employees' engagement in the provision of abortion services. In

*Casey* the Court upheld requirements of parental notification, 24-hour waiting periods and informed consent. These cases are given a score of 0 prior to the date of the decision and 1 following the decision. It is expected that the United States Supreme Court decisions will have a negative effect on access to abortion rights by providing groundwork for legislation that limits access. Therefore, if the U.S. Supreme Court is more restrictive in their court decisions concerning reproductive rights, both the state supreme courts and the state legislatures have permission if they choose to be more restrictive in their decisions concerning reproductive rights.

I measure the affect of the governor on state legislation by creating a variable that compares the political party of the state's executive and legislature. The data is derived from the State Partisan Balance data. From these data, I create a variable that when the majority of the legislature is comprised of Democrats and the Governor is a Democrat, a score of  $-1$  is assigned. When the majority of the legislature and the executive are in opposition a score of 0 is assigned, and when the majority of the legislature is comprised of Republicans and the Governor is a Republican, a score of 1 is assigned. In one particular year and state there are an even number of Democrats and Republicans in the state legislature, with a Governor who is a Democrat; I code this  $-1$ . I believe that when a state receives a score of  $-1$ , judicial and legislative decisions will be more protective of reproductive rights. Thus, when a state receives a score of 1 the state's court decisions and legislation will be more restrictive of reproductive rights.

## **Analysis**

Given our pooled cross sectional research design, I estimate the models using feasible generalized least squares (FGLS) procedure. FGLS corrects for heteroskedasticity and first-

order autocorrelation often found in OLS regression estimates with pooled data (Gujarati 1995; Kmenta 1986; Greene 1993).

## CHAPTER 4 RESULTS AND DISCUSSION

### Results

The results suggest that both legislative and judicial actions are significantly related to abortion rates however, state statutes significantly increased abortion rates while state supreme court decisions significantly decrease abortion rates. Given that most state statutes were intended to restrict abortion access and most of the state supreme court decisions protected access, the results suggest that state legislative actions are not having the intended effects.

However, it is important to consider the control variables included in the model. First, those states with higher income levels have significantly lower rates of abortion. Conversely, those states with more liberal ideologies, at least as I have measured them, have lower rates of abortions. Moreover, only Alabama had lower abortion rates when compared to our excluded category of Colorado. In addition, Alabama was the only state that was significantly different. The Supreme Court decisions in *Webster* and *Casey* had no significant affects on abortion rates. Our counter variable indicates that abortion rates have increased over the course of our decades-long series. Lastly, the states with more conservative executive and legislative branches of the state government, as were measured here; the lower the abortion rates were within the state.

### Discussion

While it is extremely difficult to formulate concrete inferences from such a preliminary analysis, the results appear to suggest that court decisions limiting access to reproductive services decrease the number of times women choose to terminate pregnancies. Conversely, statutory restrictions actually have the unintended consequences of increasing the numbers of abortions performed among women of childbearing years. While these results are curious, I assert that court decisions have more immediate effects on limitations to access. Legislative

**Table 6. Regression Coefficients for Abortion Rates with All Restrictive Statutes**

	Coefficient	z	Significance
Court Decisions	-.0068894	-3.30	0.001 ***
Legislation	.0099122	3.94	0.000 ***
Ideology	-.0000103	-0.003	0.976
Income	-.0000081	-3.66	0.000 ***
Counter	.0059919	2.49	0.013 **
Alabama	-.0886879	-3.09	0.000 ***
Florida	.0199594	0.97	0.330
Illinois	.0178299	1.13	0.259
Massachusetts	.0368025	1.31	0.191
State Government	-.0068309	-1.72	0.085 *
<i>Webster</i>	-.0082082	-0.90	0.370
<i>Casey</i>	-.009137	-1.02	0.309
***=0.01 level			
**=0.05 level			
*=0.1 level			
N	139		
R <sup>2</sup>	0.741		
Wald $\chi^2$	232.33		
Prob ( $\chi^2$ )	0.0000		

restrictions appear to be more symbolic than effective. The effects of legislative action may also be partially absorbed within the citizen ideology and state government variables, which tap general perspectives on the appropriateness of abortion as an option for reproductive choice. The results, however, clearly indicate that both have highly significant effects on abortion rates in the states studied in this analysis.

## **CHAPTER 5 SUMMARY AND CONCLUSIONS**

### **Conclusions**

These results demonstrate the importance of research on the impact of judicial decisions. This research contributes to the previous literature in several important ways. First, the research expands on the judicial literature by studying state supreme courts. Previous literature has focused primarily on the influence of the decisions of the United States Supreme Court. Our research focuses on state supreme courts and demonstrates their significance, at least in the limited analysis conducted here. Second, our research extends the work of previous scholars by assessing the competing effects of legislative and judicial bodies. While tentative, our work suggests that both have significant effects, but not in the ways necessarily intended. The unintended findings can be attributed to several different reasons. Due to the nature of the findings one can suppose that even though the legislature passes statutes concerning access to reproductive rights, the bodies, which implement these laws, do not comply until the statute has been approved through a court decision.

Given the controversial nature of our findings, I am careful to point out its limitations. First, as with all impact literature, it is difficult to parcel the effects given the complex nature of human behavior. To more accurately assess the effect of legislative and judicial actions, one would ideally seek to survey women of childbearing years and assess their choices concerning their reproductive behavior. While I assess abortion rates, abortion is only one choice available to women. Research must consider the full panoply of choices available and determine why one was selected as opposed to another and the effect that legislative and judicial actions played in that choice. It is not possible for us to assess that behavior in the limited analysis presented here.

Second, our analysis only includes five states. Expanded analysis including all 50 states would provide more a comprehensive understanding of the complex issue of the effect of legislative and judicial action on the exercise of the right to bodily privacy.

Third, our analysis evaluates the competing effects of two institutions – judiciaries and legislatures. Future research should also include the role that the executive branch also plays. Governors serve as administrators over dozens of state agencies that affect reproductive choices. Among these are health services, state financial aid, education policy and others.

Fourth, our analysis provides only cursory insight into a very complex issue. Future research would also need to include additional control variables that certainly compete for theoretical purchase. There are two issues that are not controlled for in this study that would need to be included in future studies; these issues are the impact of both public opinion and interest groups. In the literature concerning the availability of reproductive rights there is a substantial amount of work done examining the large influence that interest groups and public opinion have on access to reproductive rights. However, at this point in time measurements at the state level are not available, but should be included in future work. Other variables needed would include the religiosity of the state, literacy rates, high school graduation rates, college graduation rates, women as a percentage of the workforce, teen pregnancy rates, and the general provision of health care, among others. While this list is not comprehensive, future research must include variables that contribute to women's general reproductive choices. Nonetheless, I believe that this effort provides some initial insight into the impact of judicial decisions on the significant issue of the right of bodily privacy. It further provides an important foundation for future research.

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## APPENDIX: INDEX OF CASES

*Engel v. Vitale* (370 U.S. 421 [1962])

*Marbury v. Madison* (1 Cranch 137 [1803]).

*Miranda v. Arizona* (384 U.S. 436 [1966])

*Planned Parenthood v. Casey* (505 U.S. 833 [1992])

*Regents of the University of California v. Bakke* (438 U.S. 265 [1978])

*Roe v. Wade* (410 U.S. 113 [1973])

*School District v. Schempp* (374 U.S. 203 [1963])

*Webster v. Reproductive Health Services* (492 U.S. [1989])

## **VITA**

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